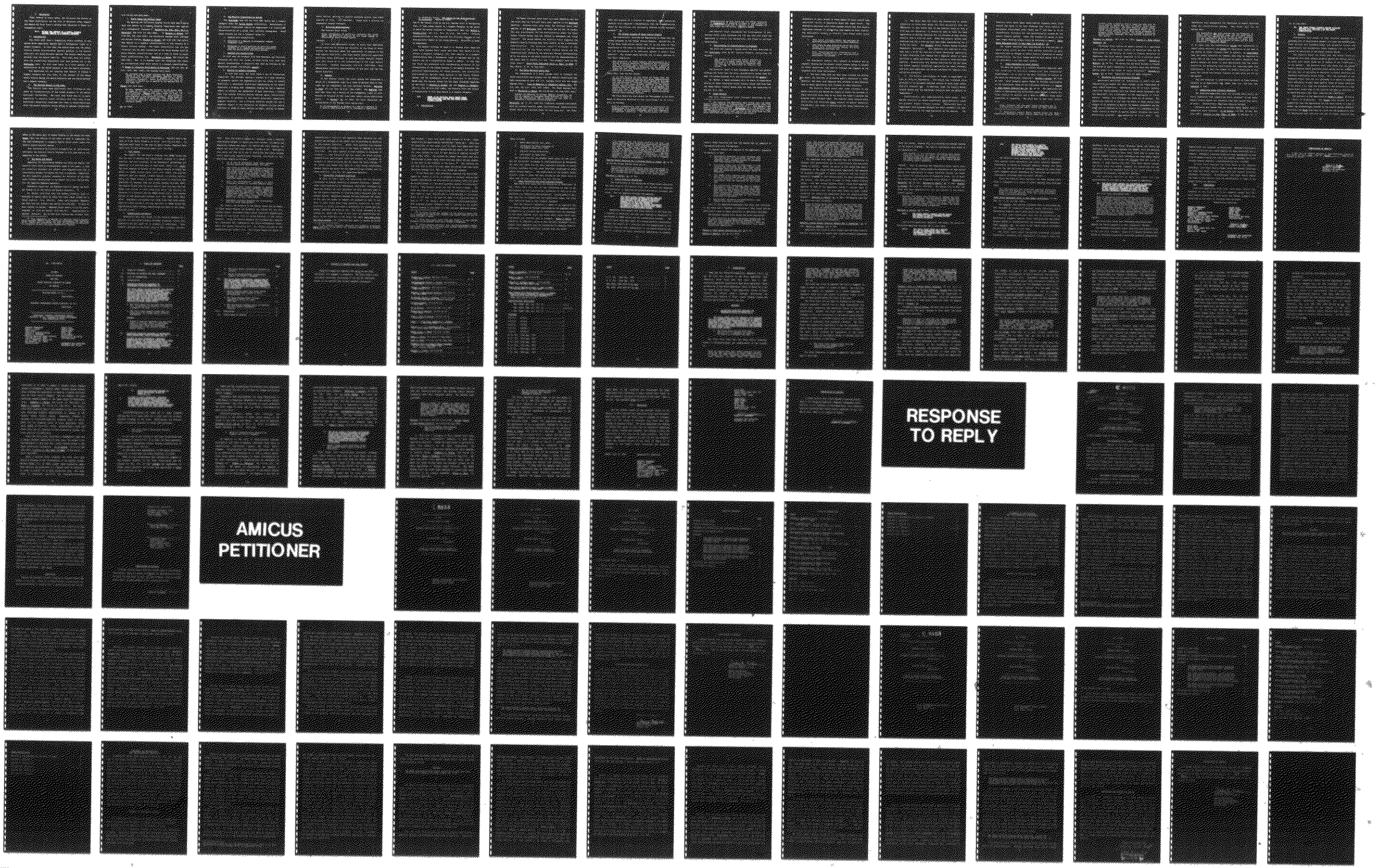
C-8353 SUPREME COURT OF TEXAS CASES 010
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. V. KIRBY, 1988-89
WILLIAM, ET AL. (3RD DISTRICT)



E. Conclusion

Under federal or state tests, the structure and history of the Texas Constitution and the role of education today support and demand the Trial Court's holding that education in Texas is a fundamental right.

XIII. WITHIN THE CONTEXT OF A SCHOOL FINANCE SYSTEM, WEALTH IS A SUSPECT CATEGORY

A. Introduction

The state must show a compelling state interest in any system which negatively impacts upon a fundamental right or a suspect category. In this case, the record shows that the school finance system discriminates against persons in low wealth districts and discriminates against low wealth families and children from low wealth families. This case does not suffer from the evidentiary weaknesses that were pointed out in the Rodriguez case. In this case there is a clear pattern of a concentration of low wealth persons in the low wealth districts.

The Appellees are not arguing that wealth is always a suspect category but only that, in the context of the Texas School Finance System low wealth districts and low wealth persons are a suspect category.

B. The Factual Record in the Case.

The District Court made significant fact findings on the issue of "concentrations of low income students in low wealth districts" (TR.562-565). The Court also found that it is more expensive to educate these children and that they bring significant educational handicaps with them to school-handicaps which low wealth districts cannot afford to address (TR.562-565;

S.F.778,827,920,3466,3484).

C. State Cases and Federal Cases

The Wyoming and California Supreme Courts have specifically held that wealth is a suspect category "especially when applied to a fundamental interest." Washakie Co. Sch. Dist. No.1 v. Herschler, 606 P.2d 310 (Wyo.1980). In Serrano v. Priest, 557 P.2d 929, 958 (Cal.1976), the California Supreme Court affirmed its earlier holding, Serrano v. Priest, 487 P.2d 1241 (Cal.1971), that wealth is a suspect classification in the context of a school finance system. The Texas Constitution has its own "vitality" and has been interpreted by the Texas Supreme Court as using federal constitutional law as a base on which to build Texas constitutional law. Whitworth v. Bynum, 699 S.W.2d 194 (Tex.1985). The U. S. Supreme Court has recognized that there are circumstances under which wealth is a suspect classification. In Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 1081 (1966), the Supreme Court held:

> We conclude that a state violates the Equal Protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.

Harper also held that:

> We must remember that the interest of the state, when it comes to voting, is limited to the power to fix qualifications. Wealth like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race [citations omitted] are traditionally disfavored. [emphasis added]

Id. at 1082.

D. The State's Classification System

The Rodriguez case did not find that wealth was a suspect category under the United States constitution. Nevertheless it did outline "traditional indicia of suspectness" i.e. traditional characteristics of a group that indicate suspectness. These three criteria are that a "suspect" group is:

1. Saddled with disabilities;
2. Subjected to a history of purposeful unequal treatment; and
3. Relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

1. Saddled with disabilities

In this case the evidence from both Defendant and Plaintiff witnesses was that low income children bring with them very special disadvantages in education that must be overcome by the educational process (TR.562-565; passim).

2. History of unequal treatment

In this case also, the Court found a set of "historical inequities" (TR. 565-566) showing a pattern of a wide variation in property wealth and expenditure and tax rates in school districts; a consistent historical underfunding of low wealth districts; a finding that inadequate funding has had a negative effect on present day operations of poor districts; a finding that the school finance system denies equal educational opportunity to students in low wealth districts, especially atypical students; and a finding that the system has had a negative impact on the education of students in low wealth districts in terms of their ability to learn, ability to master

basic skills, ability to acquire saleable skills, and their quality of life. (TR. 565-566). These show a history of purposeful unequal treatment.

3. Political powerlessness

The District Court found:

> Those individuals of political influence who could impact the political process by and large reside in districts of above average wealth.

(TR.602).

In this case Defendants sought to prove that additional monies could not be raised for education by the State of Texas without the "political power and superiority" of persons in the high wealth districts. The high wealth districts exercised political power sufficient to stop any school district finance plan that would be to the disadvantage of the high wealth districts. (Hooker testimony; and S.F. 7347-7358) This demonstrates political powerlessness of the poor and the low wealth districts.

E. Summary

In the federal courts the court system has recognized a denial of a fundamental right to a class of persons even if that right was not completely, but only seriously diluted. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1963). The Reynolds case held that there was a denial of the fundamental right to vote because of dilution of that vote under unfair voting districting plans. In Harper, id. at 1082, the Court described the jurisprudence of the Supreme Court saying that:

> to introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious

or irrelevant factor. The degree of the discrimination is irrelevant. [emphasis added]

One of the factors noted by the U.S. Supreme Court in determining that, in some cases, wealth is a suspect category is the extent to which the matter involved is "compulsory." See, e.g. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971) (finding unconstitutional a fee required for divorces because of its discriminatory impact on low income persons). Education in Texas is compulsory.

The general holdings of these U. S. Supreme Court cases and other state Supreme Court cases have been that wealth is not always a suspect category, but that wealth is a suspect classification when a fundamental right is impinged upon by the state's use of a classification based on wealth. In this case the Court was presented with overwhelming evidence of the concentration of low income persons in low wealth districts, the political powerlessness of these persons, the historical discrimination against these persons in the School Finance System, and the fundamental nature of education in the State. Based upon the factual record and the legal standards supported by the Court in Serrano v. Priest, id. and Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct.1322 (1969), the District Court was correct in finding that in this case wealth is a suspect category.

XIV. THERE IS NO RATIONAL BASIS UNDER TEXAS CONSTITUTIONAL LAW FOR THE TEXAS SCHOOL FINANCE SYSTEM

A. Introduction

The Texas "rational basis test" is a more demanding test for the state than the "rational basis test" applied in the Rodriguez decision. Alternatively, even under the rational basis test applied in the Rodriguez case, the state has not met its burden. The only justification for the discrimination under the Texas School Finance System that was offered by Defendants was "local control." The record before the District Court supports the District Court's findings that local control is not a sufficient justification. The District Court's findings on the "rationality" of the Texas School Finance System and the "justifications" offered by the state are "factual determinations as to the nature of the state objective and the reasonableness of the means used to achieve it," and "are properly made by the trial court." Texas State Employees Union v. Dept. of MHMR, 31 Tex. Sup.Ct. J. 33, 35 (Tex.1987).

B. The Texas Rational Basis Test

The independence of a state supreme court to interpret its state constitution more broadly than the Federal Constitution has been recognized by both the U.S. Supreme Court and the Texas Supreme Court. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S.Ct. 1070, 1077 (1982). The Texas Supreme Court held in Whitworth v. Bynum, 699 S.W.2d 194, 196 (Tex.1985) that:

> Subject to adhering to minimal federal standards, we are at liberty to interpret state statutes in light of our own constitution and to fashion our own test to determine a statute's constitutionality.

Whitworth, id. at 197, held that "similarly situated individuals must be treated equally under this statutory classification unless there is a rational basis for not doing so," and "even

when the purpose of a statute is legitimate, equal protection analysis still requires a determination that the classifications drawn by the statute are rationally related to the statute's purpose." Id.

C. The Avowed Purpose of Texas School Finance

The Constitution, Statutes and Regulations of Texas show the avowed purposes of the School Finance Statute. Article VII, §1 of the State Constitution states that it is the duty of "the Legislature of the state to establish and make suitable provision for the maintenance of an efficient system of public free schools." The avowed state policies are in state statutes in Tex. Educ. Code §2.01:

> The objective of state support and maintenance of a system of public education is education for citizenship and is grounded upon conviction that a general diffusion of knowledge is essential for the welfare of Texas and for the preservation of the liberties and rights of citizens.

Texas Educ. Code §16.001 states:

> It is the policy of the State of Texas that the provision of public education is a state responsibility and that a thorough and efficient system be provided and substantially financed through state revenue sources so that each student enrolled in the public school system shall have access to programs and services that are appropriate to his or her educational needs and that are substantially equal to those available to any similar student, notwithstanding varying local economic factors.

The State Board has also stated its "Philosophy of the State Board of Education Relating to the Curriculum," at 19 T.A.C. §75.1 as follows:

> public elementary and secondary education is responsible for providing each student with the development of personal knowledge, skill and competence to maximum capacity. The fulfillment of this

> responsibility by this state and its school districts is fundamental to enabling citizens to lead productive and effective lives and is further in the interest of this state and the nation. [emphasis added]

The District Court considered the relationship, if any, between these state purposes and the way that the state has determined to fulfill its obligations, and found no rational relationship.

D. Relationship of Classification to Purposes

The state has created a system which has been described in the Rodriguez case by Mr. Justice Stewart, concurring, as follows:

> The method of financing public schools in Texas, as in almost every other state, has resulted in a system of public education that can fairly be described as chaotic and unjust.[16]

The District Court in both extremely specific and general findings has found that the state classification system does not meet its avowed purposes (S.F. and Conclusions of Law passim).

Dr. Hooker, a Texas professor with 20 years of experience working on Texas state-wide school finance issues testified that the Texas School Finance System does not meet the objectives of §16.001 (S.F. 148).

E. Local Control

The only "legitimate state interest" mentioned by the

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[16] The Andrews ISD Appellants have stated that the Texas School Finance System is "unequivocably" constitutional under the Federal Constitution (Andrews ISD brief at 9). This seems a less than accurate description. Rodriguez is a 5-4 decision; the Supreme Court said that the Texas System would surely fail under the "fundamental interest test" and one of the five votes for the state described the system as "chaotic and unjust."

Defendants in their briefs is "some degree of local control over education" (brief of Appellants Eanes ISD, pages 29-33). The Defendants mentioned other state supreme courts that have found a legitimate interest in maintaining some degree of local control. The Defendants sought to distill from these cases three principles:

1. That local citizens direct the business of providing public education in their district;

2. That there be some discretion as to how local funds are distributed among various governmental services; and

3. That "experimentation innovation and a healthy competition for educational excellence" be allowed.

The Defendants however have offered no evidence and no argument showing how the present school finance system is related to these objectives; the Court's findings and judgment do not interfere with these "principles."

1. The Court Order does not deny local citizens the ability to direct the business of providing public education in their district; the Court only requires that children in each district have an equal opportunity with children in other districts.

The District Court found that local citizens in low wealth districts are denied the rights to direct the business in their districts since they do not have the funds to provide the programs their children need. The District Court exhaustively chronicled the detailed <u>state</u> control of public education (TR.578-591); the range of flexibility for local districts is minimal.

2. The Court does not limit the flexibility of school districts to raise more money for fire protection than for education; it only states that if one district wants to levy a $.50 rate for education, it should be able to have the same opportunity to provide education for its children as does another district with a $.50 tax rate. Under the present system some districts buy for a $.09 tax rate what other districts buy for a $1.50 tax rate. The present school finance system violates Defendants' "principle." Poor districts are required to levy more than a $1.00 tax rate for an equal educational opportunity in their districts; this clearly has a negative effect on their abilities to spend more money on fire, police or other municipal services. Alternatively very wealthy districts for low tax rates can afford superior educational opportunity for their children, and still have additional tax monies available for superior fire and police protection.

3. The State's justification of "right to experiment" is also no help to Defendants. The state has violated this principle in its extremely detailed control of every local school district function (Id). In addition, under the State's School Finance System only the wealthiest districts have the ability to "experiment."

Unfortunately most experimentation costs money. Only wealthy districts can afford significant experimentation under the present school finance system. Plaintiffs want to "experiment" with programs designed for their children - not just avail themselves of the experimentation by the wealthy. The

District Court below spent weeks hearing arguments about local control and found in its fact findings that local control is extremely diminished under Texas law [17] and that it is an insufficient rationale for the discrimination caused by the school finance system. Under the standard of review in this case, these findings simply cannot be disturbed on appeal. Texas State Employees Union v. Tex. Dept. of M.H.M.R., id.

Mr. Foster testified that $650,000,000 to $700,000,000 of state money could be sent from wealthy districts to poor districts with no changes in school district boundaries or taxing jurisdictions; the only change would be more equity (D.X. 27; S.F. 3011-3012) - not less local control.

F. Legal Standards on Local Control

"To make the quality of a child's education dependent upon the location of private commercial and industrial establishment...is to rely on the most irrelevant of factors as the basis for educational financing." Serrano v Priest, 487 P.2d at 1253. Local property wealth "bears no rational relationship to the educational needs of the individual districts...", Dupree v. Alma School District No. 30, id. at 30. The appellants are unable to demonstrate any articulable nexus between a desire for local control of schools and a need to maintain these stark conditions of inequality. The plain fact is that local control is a:

> cruel illusion for the poor school districts due to limitations placed upon them by the system

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[17] Defendants expert Ward, agreed there has been a significant decrease in local control under H.B. 72 (S.F. 7332).

> itself...only a district with a large tax base will be truly able to decide how much it really cares about education [TR.576]. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.

Serrano v. Priest, 487 P.2d at 1260; Dupree v. Alma School District, id.

"Although local control of public schools is a legitimate state objective, since local control of education need not be diminished if the ability of towns to finance education is equalized, the local control objective is not a rational basis for retention of the present financing system." Horton v. Meskill, id. at 370. "No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts." Serrano v. Priest, id. at 1260. Appellants have not shown otherwise.

G. Statutory and Constitutional Purposes

Appellants mentioned two references in state law and regulations as support for their concept on the "importance of local school districts." Defendants rely on 19 T.A.C. §165(a) (entitled "Relationships with the United States Government and Its Agencies") for a statement on the importance of local control. However, this statement was taken out of context. The regulations referred to say that the State of Texas should have control of its programs as against the federal government and the local control referred to in T.A.C. §165(a) is a reference to the "local control of states" as against federal intrusion into state educational programs. See generally 19 T.A.C. §165. The

Defendants also exaggerate the importance of school districts under the constitutional system. Tex. Const. art. VII, §3 states that:

> the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes and all said districts... [emphasis added]

It is clear that the Constitution allows the legislature to create school districts and allows the legislature to use them in the system of school finance; there is certainly no requirement that the school districts be created, that they be required to raise 50% of the total expenditures on public education from greatly unequal tax bases, or more specifically that the school districts, as presently constituted, are required under the Constitution. In fact the number of school districts in the state has varied from several thousand to 1063 since art VII §3 was passed.

The last statutory or constitutional source of local control referred to by Appellants, TEX. CONST. ANN. art. VII §3a, was repealed in 1969.

H. Compelling State Interest Arguments

The Defendant-Appellants have not briefed their point of error regarding "the compelling state interest" of the Texas School Finance System and therefore they have waived that point of error. Alternatively, Appellees argue as follows:

Certainly any system with no rational basis cannot have a compelling state interest. In Re McLean, 725 S.W. 2d 696, 698 (Tex.1987); T.S.E.U. v. Tex. Dept. of MHMR, 31 Tex.Sup. Ct. J.

33, 35 (Tex.1987)

XV. THE TEXAS SCHOOL FINANCE SYSTEM VIOLATES ARTICLE VII, SECTION 1 OF THE TEXAS CONSTITUTION.

A. Summary

Defendants have sought to take isolated examples of a presumed lack of relationship between tax rates and expenditures, test scores and expenditures, and property values and expenditures and extrapolate these examples into an overall pattern of efficiency of the school finance system.

The District Court has found that the school district boundaries with their unequal property wealth and unequal ability to raise local school funds are an example of the "inefficiency of the system." The District Court also found that the school finance formulas which distribute state monies are not related to the real cost of providing an education in school districts and therefore misallocate state funds. Even the proceeds of the Permanent School Fund are not allocated in a manner to maximize their efficiency to meet these special needs of school districts in the state, i.e., they are allocated to the districts on a per capita basis rather than to the counties and then to districts on an equalized basis. Tex. Educ. Code §16.254 & §15.01(b).

The reliance of the Appellants on Mumme v. Marrs, 40 S.W.2d 31 (1931) is misplaced. The Mumme case stands for the proposition that the Legislature can use state monies in a way to offset the disadvantages created in the state's system of school districts; the Mumme case does not stand for the proposition that the Legislature must continue the use of school district tax

bases as the major part of school funding in the state; nor does Mumme limit the efforts of the state to seek to compensate for the vast differences in property wealth which exist under the state's school district system.

The Defendant-Appellants allegations on efficiency contradict the District Court's findings in this case and are not supported in the record.

B. Tax Rates and Wealth

Regarding the relationship between tax rates and wealth, the District Court found an extraordinary range of tax rates , a lack of relation between tax effort and expenditures and a relationship between low wealth and lack of programs - especially the more expensive programs necessary for education of the high costs children concentrated in low wealth districts (TR.552-554; P.X. 48, Appellee Edgewood Appendix).

Defendants argue that the Edgewood district spends "as much" per student as do the Dallas and Houston districts. [18]

Dr. Hooker testified that the method normally used in analyses of equity would be state and local taxes raised for a school district (S.F. 706-707). Under this analysis, Edgewood has $250 less per student than Dallas (S.F.707,709). To have as much revenue as Dallas, Edgewood would need a $1.23 tax rate, compared to $.54 for Dallas (S.F.708,709). Highland Park (a wealthy district) has $1,000 more revenue per student than

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[18] This comparison is against the District Court's opinion which excludes federal funds, and also contradicts the testimony of Mr. Foster who considered the cost of providing an education in a district as well the gross expenditure figures.

North Forest (a poor Plaintiff-Intervenor). Highland Park's tax rate is $.34; North Forest's is $1.12 (S.F.710,P.X.205). If Highland Park taxed at the rate of North Forest, Highland Park would have $12,403 revenue per pupil (S.F. 711-713).

C. Test Scores

The support for the Court's findings that TEAMS scores are not the way to measure the educational program in a school district, and the criticisms of the Defendants' methodology are explained in a previous part of this brief. (§VIII I.2., infra) The total measure of success of the school program is simply not based on TEAMS scores alone (S.F. 773; 6690); and quality education goes far beyond a simple mastery of minimum skills. Using the TEAMS scores to make comparisons of districts has absolutely no meaning; they are totally useless (S.F.88; 583). The experts stated that one would need to know alot more than the TEAMS test scores to know something about the quality of education in a district and the TEAMS scores give a very limited picture of the educational process (S.F. 742, 1006, 2305, 4053, 4474). Defendants accountable cost study found that those school districts which scored in the top one-sixth on TEAMS scores had significantly above average expenditures per pupil in the state. (P.X.212, p.19).

D. Expenditures and Wealth

Defendants have also sought to use isolated examples of a pattern of non-relationship between property values and expenditures per pupil as an example of efficiency. This directly contradicts the Trial Court's fact findings (TR.535-

539). Even the state's expert Dr. Verstagen found a moderate relationship between (1) wealth and total revenue, (2) wealth and operating revenue per pupil, (3) wealth and local revenue, (4) wealth and local and state revenue (D.X.48, p.27). Defendants also point out that 24 of the 67 Plaintiffs have above average state operating expenditures (Andrews ISD brief at 26). Plaintiffs respond as follows:

1. 32 of the 48 Defendants spend above average current operating expenditures; (P.X.205)

2. That under an analysis considering the actual cost of providing an educational program in the school district, that only 6 of these 67 Plaintiffs spend above average in the state and 43 of the 48 Defendants spend above average in the State; (P.X.103) (Plaintiff Appellees Appendix I.A.)

3. That the Defendants' analysis is also irrelevant because it includes federal funds.

4. Plaintiffs have listed examples of wealthy and low wealth districts and their respective property values, tax rates, current operating expenditures and expenditure per student unit (Appellees appendix I.A). These show the pattern in Texas school finance - tax high-spend low, tax low - spend high.

5. Defendants isolated examples are inconsistent with the state wide pattern.

Mr. Foster, the Director of the Equity Center and an expert in Texas School Finance and property tax issues for the last fifteen years, considered every school district's expenditures related to the actual cost of doing business in the school district. Using the state's formulas for bilingual ed., special ed., vocational ed., compensatory ed, Price Differential Index, small and sparse indicators etc., Mr. Foster arrived at the expenditures per student unit. This figure showed the amount of

expenditures a district was spending when adjusted for the state's own estimate of the actual cost of providing an education in the school district. Under this analysis the average expenditure per student unit in the state in 1985-86 is $2,149 (P.X.103A). The clear pattern is that hundreds of thousands of students in some districts get far above the state average expenditures per student unit and hundred of thousands of students in other districts get far below the state average. [19] Mr. Foster also showed that there is a very strong relationship between wealth per pupil and the expenditure per student unit in those districts (P.X.102, 107; Appellees Appendix).

E. Plaintiffs "Proposed" Solutions

As part of their case, the Plaintiffs did not develop testimony or produce exhibits on proposed solutions. However, under cross-examination by Defendants, Plaintiffs' witnesses did describe several far more equitable and more efficient ways to use the state's resources in financing public education than the present system. Appellants Andrews ISD have misstated the record of the case and sought to support the proposition that if you were to move money from "high spending districts" to other districts it would only make a difference of around $10 per student (Andrews ISD brief at 37). The actual testimony of the witness Dr. Jewell was that if you took the expenditures per pupil of the districts in the state that spent more than twice the state average i.e. districts that spent in excess of $6,700

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[19] Mr. Foster' analysis, admitted into evidence, considered every district in the state, not isolated examples as in Andrews ISD brief at 26.

per student - twice the state wide average of $3,350 - there would still be approximately $30,000,000 "freed up." There are 47 districts in the state (out of 1063) that spend more than twice the state average of expenditures per pupil, and this does not even include the cost of debt service or capital outlays[20] (S.F. 5785, 5782). The witness Dr. Jewell then found that this $29,351,000 in extra money would only mean about $10 per student to the rest of the students in the state. [21] His analysis did not even look at districts that spent one dollar less than twice the state average (S.F. 783), e.g. $6,699 per student.

On the other hand, when Defendants requested the Plaintiffs' expert Mr. Foster to do so, he produced an analysis showing that between $650,000,000 and $700,000,000 of present state aid could be re-distributed in a far more equitable fashion (S.F.3011-3012; D.X.27). This movement would not cost the state a penny. The Court was clearly right in questioning the efficiency of a system that sends at least $650,000,000 to $700,000,000 to districts which do not need it and does not send it to districts that do need it. [22] Dr. Hooker, after extensive cross-examination, also produced several different ways of looking at the school finance formula in the state in a far and more equitable manner.

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[20] An extra $3,350 per student in the district means that in a classroom of twenty-two students the school district has an extra $74,000 to spend.

[21] Even this would send $200 per student to the 150,000 students in the poorest districts, $4,400 a classroom.

[22] Those wealthy districts e.g. Carrollton-Farmers Branch could make up for the lost funds with minimal additions to their tax rates (D.X. 27; P.X. 107).

These included:

1. power equalization (S.F. 445);

2. increasing the basic allotment to its proper level (S.F. 510);

3. regional taxing authorities;

4. guaranteed tax base yield.

The Plaintiffs did not propose these plans to the Court. But the Plaintiffs' witnesses on cross-examination by Defendants did show that there are far more equitable methods of school finance available and that these have been recognized by state school finance experts. The inefficiency of the present school district lines in Texas has been noticed by the State since at least 1949 (Pl.-Int. brief; P.X. 25; S.F. 712-714)

F. Legal Precedents and Constitutional History

Appellants also argue that the definition of "efficient" in Tex. Const. Ann. art. VII, §1 was understood by some of the participants at the Constitutional Convention of 1875 to be the equivalent of "simplicity and minimality" (Irving Brief at 24). They urge that in interpreting the Constitution today, the trial court should be bound to this "simple" standard.

That the future of education in Texas as we approach the 21st century should be forever constrained by the supposed notion of simplicity in a by-gone age is inconsistent with the teachings of the Texas Supreme Court and other state courts which have considered and rejected such an argument. Mumme v. Marrs, 40 S.W.2d 31, 36 (Tex.1931) tells us that the word "suitable" "is an elastic term, depending upon the necessities of changing times or conditions..." As the Washington Supreme Court has noted:

> (t)o suggest that the state fulfills its duty...by merely providing more acceptable educational facilities than those of 1889 is utter nonsense. We cannot ignore the fact that times have changed and that which may have been "ample" in 1889 may be wholly unsuited for children confronted with contemporary demands wholly unknown to the constitutional convention. ...We must interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied...

Seattle School District No. 1 of King County v. State, id. at 94.

As the New Jersey Supreme Court put it:

> The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.

Robinson v. Cahill, id. at 295.

G. School District Boundaries

The inefficiency of the boundaries of Texas school districts has been found by the District Court (TR. 601-603) and commented on extensively in Appellees-Plaintiff-Intervenors Alvarado ISD brief. Also see Appellee Alvarado ISD appendix.

XVI. THE TEXAS SCHOOL FINANCE SYSTEM DOES NOT DOES NOT PROVIDE AN ADEQUATE EDUCATION FOR STUDENTS IN LOW WEALTH DISTRICTS; HOWEVER IT IS NOT THE BURDEN OF PLAINTIFFS TO SHOW THE SYSTEM INADEQUATE IN ORDER TO PREVAIL ON PLAINTIFFS' EQUAL PROTECTION OR EFFICIENCY CLAIMS

Appellants have argued that every district in the state has a "quantum of education" and that this "quantum of education" is manifested by TEAMS scores and the accreditation process. The District Court held that there is a strong positive relationship between the wealth of a district and the expenditures in the district; that the lower expenditures in low wealth districts did lead to a denial of equal educational opportunity to students

within those districts and that the system was not adequate in low-wealth districts (TR.558-562).

In general however the response to the Appellants' arguments on adequacy is that:

1) Defendants produced no clear evidence that the education in districts was in fact adequate; their evidence related to standards that they purport to enforce.

2) Although there was no challenge to the curriculum standards per se, there were findings that low wealth districts cannot meet the standards set by the State Board of Education;

3) The TEAMS tests measure only minimal basic skills and do not even purport to measure all of the elements of a "well-balanced curriculum" that are demanded by the state law;

4) The statistical methodology used to support Defendants' thesis was rebutted on cross-examination and experts on both sides said that even if these statistics were correct those statistics showed nothing about the full educational programs at the school districts in the state;

5) Plaintiffs' evidence is preponderant, and clearly more than a scintilla.

Even if the Appellants-Defendants had shown that districts in the state had a "quantum of education," this would not be sufficient to meet an equal protection or efficiency challenge.

The Arkansas Supreme Court stated the point succinctly:

> For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity.

Dupree v. Alma School District No. 30, id.at 93.

Horton v. Meskill, id. at 373, held:

> True, the state has mandated local provisions for a basic educational program with local option for a program of higher quality but...(T)his Court has never suggested that because some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action.

The appellees have never asserted that all differences in student test performance can be statistically and precisely linked to dollars. Rather the point is that money does make a difference in the range of educational opportunity and adequacy of programs available in school districts and the Court's extensive findings on that obvious point are amply buttressed by the record. The same point is made in other school finance cases. The New Jersey Supreme Court, cited with apparent approval by some of the appellants, noted "...dollar input is plainly relevant and...we have been shown no other viable criterion for measuring compliance with the constitutional mandate." Robinson v. Cahill, id. at 295. The Wyoming court put the point even more forcefully:

> While we would agree that there are factors other than money involved in imparting education, those factors are not easy of measurement and comparison. ...It would be unacceptable logic to deduce that the wealthy counties are squandering their money from the fact the poorer counties are getting along just fine and providing an adequate education....It is nothing more than an illusion to believe that the extensive disparity in financial resources does not relate directly to quality of education.

Washakie County School District Number One v. Herschler, id. at 319; Horton v. Meskill, id. at 368.

Appellants also argue at great length that the Trial Court's opinion constituted an attack upon constitutionally recognized

local tax levies. However this is a strained and slanted reading of the court's findings. The court's conclusions were based on an examination of:

> the system in its entirety, including both State funding formulas as well as local district configurations and the wealth of those districts and how these factors interact to create the State system of funding public education.

(TR.592). This is precisely the examination which courts have made in other school finance cases--an examination of "the entire system from organization of school districts through tax bases and levies and distribution of foundation funds, all of which have bearing upon the disparity which exists." Washakie v. Herschler, id. at 335; Robinson v. Cahill, id. at 294; Serrano v. Priest, 487 P.2d at 1250-1251. The bottom line is that the State must bear responsibility for the results of the school finance system.

> Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands... If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must meet its continuing obligations.

Robinson v. Cahill, id. at 294.

XVII. THE TEXAS SCHOOL FINANCE SYSTEM DENIES DUE COURSE OF LAW TO STUDENTS WITHIN LOW WEALTH DISTRICTS

Plaintiffs-Appellees Edgewood ISD adopt the brief of Plaintiffs-Appellees Alvarado ISD on this issue.

XVIII. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE DEFENDANTS ARE IMMUNE FROM LIABILITY FOR ATTORNEYS FEES

XIX. THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT ENTERING JUDGMENT FOR PLAINTIFFS AND PLAINTIFF-INTERVENORS AGAINST STATE DEFENDANTS FOR ATTORNEYS FEES AND COSTS IN THE AMOUNTS FOUND BY THE TRIAL COURT TO BE REASONABLE AND NECESSARY

The District Court determined that an award of attorneys fees against state Defendants and school district Defendant-Intervenors is barred by sovereign immunity (TR.606), but "were it not for the doctrine of sovereign immunity the Court would enter Judgment against Defendants for Plaintiffs and Plaintiff-Intervenors' attorneys fees and costs" (TR.607).

After the District Court decision, the Texas Supreme Court held in response to a claim of state immunity from attorneys fees:

> The Legislature has provided express statutory authority for payment of court costs and attorney's fees in actions arising from the unconstitutional conduct of state officials.

Texas State Employees Union v. Tex. Dept. of M.H.M.R., 31 Tex. Sup. Ct. J. 33, 36 (Tex. 1987).

The T.S.E.U. case granted attorneys fees to Plaintiffs who had received an injunction against state officials and a declaratory judgment that a state policy was unenforceable.

In this case Plaintiffs have won an injunction and declaratory judgment against state officials that the School Finance System is unconstitutional and unenforceable; therefore, under T.S.E.U., id., the state is not immune from an attorney's fee and costs judgment in this case.

The Trial Court found Plaintiffs attorneys incurred reasonable, necessary and compensable attorney's fees for

Kauffman, Rice, Cantu, Perez, Browning, Garza, and Juarez and reasonable and necessary expenses for MALDEF, Rice and Browning (TR.604-607). Since the Trial Court found that it would have entered judgment against state Defendants for this amount absent sovereign immunity and since the T.S.E.U case has found no immunity in cases exactly like this, this Court should reverse the Trial Court and render judgment for Plaintiffs for the attorneys fees and expenses found by the trial court to be reasonable and necessary (TR.506-507; 604-606).

The monetary amounts of fees and costs and the reasonableness of the fees is not challenged by Appellants.

XX. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING ATTORNEYS FEES AGAINST DEFENDANT INTERVENOR SCHOOL DISTRICTS AND ERRED AS A MATTER OF LAW BY NOT RENDERING JUDGMENT FOR FEES AND COSTS AGAINST DEFENDANT INTERVENOR SCHOOL DISTRICTS

The Trial Court determined that:

> Even if Defendant-Intervenors [school districts] do not have sovereign immunity from an award of attorney's fees, the Court would not exercise its discretion to award attorney's fees against Defendant-Intervenors. Although Plaintiff and Plaintiff-Intervenors prevailed on the merits, the Court finds that an award of attorney's fees would be neither equitable nor just under the terms of Tex. Civ. Prac. & Rem. Code §106.001-003, that the Court would decline to exercise its discretion to award attorney's fees against Defendant-Intervenors under §106.002.

(TR.507)

The Trial Court found that "Defendant-Intervenors have adopted the State's position in this litigation" (TR.604).

The Defendant-Intervenor school districts participated fully in the trial (S.F. 1-8,000). Seven of 12 defense witnesses were called by Defendant-Intervenors requiring extensive preparation,

depositions and rebuttal by Plaintiffs. Defendant-Intervenors listed but did not call other experts for whom Plaintiffs had to prepare. Defendant Intervenor districts were represented by from 3 to 8 lawyers during the trial and greatly extended the trial through lengthy redundant cross-examination (S.F. 1-8,000).

If this Court reverses the Trial Court on its immunity holdings, this Court should render joint and several liability for fees and costs against the state and school district Defendant Intervenors. Alternatively, this Court should remand the issue to the District Court for determination in light of the proper holding on immunity.

XXI. CONCLUSION

Plaintiff-Appellants pray that this Court affirm the Judgment of the Trial Court in all respects, except that this Court should reverse the Trial Court and render judgment for Plaintiffs on the issue of attorneys fees and costs.

Respectfully submitted,

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I have sent by Federal Express or hand delivered copies of this Brief on this 11th day of March, 1988 to all counsel of record.

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NO. 3-87-190-CV

IN THE

COURT OF APPEALS

FOR THE

THIRD JUDICIAL DISTRICT OF TEXAS

AT AUSTIN

WILLIAM KIRBY, et al.,

Appellants,

v.

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Appellees.

APPELLEES' EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL. RESPONSE TO STATE-APPELLANTS' POST SUBMISSION BRIEF

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I. TABLE OF CONTENTS

II. RESPONSE TO REQUEST FOR ORAL REQUEST

Plaintiffs-Appellees Edgewood ISD, et al do not feel additional oral argument is necessary. The Trial Court's well considered additional conclusions of law and the additional briefs of the parties make further argument unnecessary.

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CASES PAGE

IV. INTRODUCTION

Come now the Plaintiffs-Appellees, Edgewood I.S.D., et al, who file this response to the State Appellants' Post Submission Brief filed with this court July 1, 1988. Plaintiffs-Appellees specifically deny State Appellants' Point of Error No.13 and State Appellants' Point of Error No.14 for the reasons stated below. State Appellants' Points of Error misstate the District Court's findings, misconstrue the constitutional history of Texas' school finance system and misstate the holdings of Texas case law.

ARGUMENT

V. PLAINTIFFS-APPELLEES RESPONSE TO DEFENDANTS POINT OF ERROR NO.13

THE TRIAL COURT DID NOT CONCLUDE THAT ARTICLE VII, §1 MANDATES EQUALITY OF ACCESS TO A PROPERTY TAX BASE AND THEREFORE APPELLANTS' POINT OF ERROR IS COMPLETELY IRRELEVANT. THE HOLDINGS OF THE TRIAL COURT AND ITS JUDGMENT ARE SUPPORTED BY THE HOLDINGS OF TEXAS COURTS, THE TEXAS CONSTITUTION AND HOLDINGS OF OTHER STATE COURTS.

A. The Trial Court did not hold that Article VII, §1 mandates an equality of access to a property tax base

The Trial Court held that the Texas School Financing System is unconstitutional and unenforceable in law because it:

> fails to ensure that each school district in this state has the same ability as every other district to obtain, by state legislative appropriation or by local taxation, or both, funds for educational

> expenditures, including facilities and equipment, such that each student, by and through his or her school district, would have the same opportunity to educational funds as every other student in the state, limited only by discretion given local districts to set local tax rates.
>
> TR. 502

The State has tried to rephrase the Court's judgment in order to make it easier to attack on appeal. The state has sought to support its arguments by a random hodgepodge of arguments which have been raised in previous briefs in the case, or were waived before the trial of the case.

The Trial Court did not base its holding on the "uniform taxation provision," Article VIII §1, Texas Constitution, but on the equal protection and education clauses of the Texas Constitution. Neither the Trial Court's judgment nor its findings of fact and conclusions of law require equal property value per student, a statewide property tax or that all school revenues be generated from statewide revenues. The Trial Court does require the Legislature to use its discretion in a manner that guarantees equal protection to school children in the state, while allowing the Legislature to use school districts to share in the state's burden of raising funds for education of children in the State.

B. The Trial Court properly held that the Legislature can change school district boundaries".

The Texas Commission on Appeals summarized this standard when it held that:

> there can be no doubt, however, that, except where some right having its foundation in the Constitution will be impaired by the change, the Legislature, by virtue of the above constitutional provision has authority to change, at will the territorial boundaries of any school district and to provide the mode and agencies by which such change shall be effected.

Prosper I.S.D. v. County School Trustees, 58 S.W. 2d 5, 6, (Tex.Comm'n.App.1933, opinion adopted). Prosper held that the provision in Article VII, §3 allowing the Legislature to create school districts was redundant, since the Legislature had the authority to draw school districts under its general powers. Prosper, id.

In Love v. City of Dallas, the main case upon which State Appellants rely for their defense on this issue, the Texas Supreme Court held that:

> "generally it must be said that the Legislature may from time to time, at its discretion, abolish school districts or enlarge or diminish their boundaries or increase or modify or abrogate their powers.

Love v. City of Dallas, 40 S.W.2d 20 (Tex.1931).

The Love court spoke in detail of the tremendous power of the Legislature to create, destroy, modify, abolish, enlarge, or restrict school districts and their territory or powers.

The cases on which Defendants rely to show the limitation of Legislative authority in the structuring of school districts are particularly non-persuasive for Defendants' case. In fact, these cases, as well as cases since the 1930's, show the tremendous flexibility which the Legislature

has sought to use in its control of the formation, dissolution, consolidation of school districts, and its clear approval of "special acts." Defendants stipulate that the Legislature had "plenary power" with reference to creation of school districts up until the 1927 Amendment of Article VII, §3 (which removed the word "special" from the power of the Legislature to create school districts). See, for example, Terrell v. Clifton Independent School District, 5 S.W.2d 808, 810 (Tex.Civ.App.-Waco 1928) which, after the 1927 Amendment, still held that "the Constitution invests the Legislature with plenary power with reference to creation of school districts." El Dorado I.S.D. v. Tisdale, 3 S.W.2d 420,422 (Tex.Comm.App. 1928, opin. adopted), relied on Art.VII, §1 for its holding that:

> the object [making suitable provision for support and maintenance of an efficient system of public free schools] manifestly is a state object; its achievement, as plainly, is to be a consequence of user of state power - governmental in se. Discretion of considerable latitude is obvious.

The El Dorado Court went on to hold "[t]hese powers are continuing, and in nature they are such as not to be delegable." El Dorado, 3 S.W.2d at 422.

A pattern developed in the early 1930's under which the many special laws that had been passed and were being passed were in effect "validated" every so often by the Legislature in a "general law". For example, see Lyford Independent School District v. Willamar I.S.D 34 S.W.2d 854 (Tex.Comm. App.1932, opinion adopted). The Texas Commission on Appeals

was literally flooded with cases against school districts that were created under the "special" provisions. The Legislature merely validated these special school districts by a "general" law. This process has been continued. In 1935 the Legislature was continuing to "cure" its constitutional "violations." In Marfa I.S.D. v. Wood, 141 S.W.2d 590 (Tex.Comm.App.1940 opinion adopted) the court stated:

> curative acts have been held to be effective to validate the creation of school districts embraced within the terms thereof even though the procedure by which such districts were formed was so irregular as to render the same void and though the authorizing statute was unconstitutional.

Marfa I.S.D., 141 S.W.2d at 592. Similar strategies have been used and approved by the Legislature in the 1960's. West Orange Cove Consolidated I.S.D. v. County Board of School Trustees of Orange County, 430 S.W.2d 65 (Tex.Civ.App.Beaumont 1968, writ ref'd. n.r.e.).

A review of Vernon's Statutes shows the tremendous variety of strategies developed by the Legislature to allow school districts to do whatever they wished under the guise of "general law." See, for example V.A.T.S. §§2740a (1939), 2740b (1929), 2740d (1931), 2740f-2(1937), 2470f-3 (1941).

The intimate involvement of the Texas legislature in creating, administering and even setting salaries for school districts in Texas is clear from even a cursory glance at the Texas legislative history, see e.g.

(1) H. B. 723, 47th Leg., 1941 (setting maximum tax rate in school districts in counties between 10,400 and 10,660 population)

(2) H. B. 732, 47th Leg., 1941 (creating positon and delineating duties of rural school supervisor in counties between 37,250 and 38,350 populaton)

(3) H. B. 1023, 47th Leg., 1941 ("An act exempting Truscott Independent School District of Knox County from county supervision; providing for a separate depository; and declaring an emergency.")

(4) H. B. 948, 47th Leg., 1941 (creating Eolian Common School District No. 4 by metes and bounds and appointing board of trustees)

(5) S. B. 61, 53rd Leg., 1953 (general validating statute validating all districts and all acts of districts)

(6) S. B. 100, 59th Leg., 1965 (general validating statute validating all districts and all acts of districts)

(7) S. B. 401, 59th Leg., 1965 (setting election of trustees in districts between 704 and 708 students according to last published official scholastic census)

(8) H. B. 493, 62nd Leg., 1971 (setting $2.00 maximum tax rate in districts with less than 200

students in counties with between 18,000 and 18,690 population)

The "new" tremendous respect that the Legislature through the Attorney General has for the "sanctity" of school districts is also inconsistent with the Legislature's authorization for "county wide equalization" fund or county unit system of equalization taxation. TEX. EDUC. CODE §18.01 et seq. The Legislature has also passed detailed provisions for consolidation, annexation, deannexation, etc. of school districts. See, e.g., TEX. EDUC. CODE §19.001 et seq. The Legislature has provided for the transfer of one school district's debt to another school district and one school district's assets to another school district. See TEX. EDUC. CODE §19.001 et seq.

Summary

The Legislature has had the authority and does have the authority to use the state's resources in a way to maximize efficiency and equality in the school finance system. The Legislature has chosen not to do so even though it both has and has exercised similar powers in the school finance area.

C. Though it was not necessary for the Trial Court to so find, there is evidence to support the Trial Court's finding that there are reasonable alternatives to the current system of school finance.

This point of error was waived by the Appellants since it was not made in the original appeal. The Trial Court would be

criticized if it were to impose a certain school finance system or recommend a certain school finance system without first allowing the Legislature to draw up a system consistent with the Trial Court's judgment. See for example, the cases involving reapportionment of the Texas House of Representatives, Clements v. Valles, 620 S.W.2d 112 (Tex.1981), and Smith v. Craddick, 471 S.W.2d 375 (Tex.1971). The State's brief does summarize some of the evidence at the trial of the case involving proposed modifications or changes in the present school finance system. Additional evidence is reviewed in Plaintiffs-Appellees original brief at 58-60. Under the "no evidence" point in state appellants' brief, their appeal on this issue fails. Alternatively, since the Trial Court was not required to find alternative systems, any error would be non-reversible.

Since the Trial Court found both a fundamental right and a suspect category implicated in this case, the burden is on the Defendants to show that their school finance system is the least restrictive alternative. In re McLean, 725 S.W.2d 696 (Tex.1987); T.S.E.U. v. Tex. Dept. of MHMR, 31 Tex.Sup.Ct. J. 33,35 (Tex.1987).

Under a rational basis standard, the trial court made detailed findings on the irrationality of the present system. Neither Texas, U.S. or other states' equal protection cases have required the production of a "better plan" by Plaintiffs in order to prevail in an equal protection case. See cases cited in Plaintiffs [pp.45-53] and Plaintiff-Intervenor

[pp.41-58] briefs.

VI. PLAINTIFF-APPELLEES RESONSE TO STATE APPELLANTS' POINT OF ERROR NO. 14.

FAILURE TO ADOPT DEFENDANTS' PROPOSED CONCLUSIONS OF LAW IS NOT A BASIS FOR A LEGAL POINT OF ERROR. ALTERNATIVELY THE TRIAL COURT'S SUPPLEMENTAL CONCLUSIONS OF LAW ARE SUPPORTED BY TEXAS CONSTITUTIONAL HISTORY, TEXAS CASE LAW, AND TEXAS HISTORY

Plaintiffs-Appellees are aware of no legal standard stating that it is legal error for a trial court not to adopt proposed findings of the state. Nevertheless the District Court's historical analysis is correct and sufficient.

A. The Trial Court's Historical Analysis Is Correct

At the time of the writing of the Texas Constitution and the amendment to Article VII, §3 in 1883, the Texas population was relatively homogeneous without varying concentrations of property wealth (S.F. 1921-25)

In 1900 there were approximately 11,000 school districts, almost all of which were one school districts (S.F.1923).

These are the circumstances that informed the judgment of the original drafters of the Texas Constitution and the setting for Art. VII, §3 that allowed the Legislature to create school districts and allowed the Legislature to allow school districts to tax.

These are the circumstances the District Court considered when concluding that Art. VII, §3 does not change the District Court's Judgment.

Defendants have reinterpreted the Texas Constitution to allow-almost to bless-the inequities in the present system. Understandably, they offer no citations or record references for their leaps of faith, see e.g. State's Post-Submission Brief at pp.33-34.

Plaintiff-Intervenors briefs have discussed the application of the history of Texas school finance to the issues of this case in more detail. See, Brief of Appellees Alvarado I.S.D., et al, at 16-17, 23, 36-40, and generally Walker testimony at S.F. 1917-2048.

B. Rules of Constitutional Construction Support the Court's Judgment

In addition to the rules of Constitutional analysis described by this Court of Appeals, additional Texas rules of constitutional construction support the Trial Court's Judgment. "Constitutional and Statutory provisions will not be so construed or interpreted as to lead to absurd conclusions, great public inconvenience or unjust discrimination if any other construction or interpretations can reasonably be indulged in." Cramer v. Sheppard, 167 S.W.2d 147, 155 (Tex.1942). "No amount of acquiescence can legalize a usurpation of power or defeat the will of the people plainly expressed in the constitution." [In response to the rule of

construction that acquiescense by the Legislature is evidence of constitutional standard] Kimbrough v. Barnett, 55 S.W.2d 120 (Tex. 1900), and Ex Parte Heyman, 78 S.W.2d 349 (Tex.1909). Later provisions of the Constitution will be given control and effect, "but this rule would only be applied upon determination that it is impossible to harmonize the provisions by any reasonable construction which would permit them to stand together". Collingsworth County v. Allred, 40 S.W.2d 13,15 (Tex. 1931). The word "suitable", as used in Article VII, §1 of the Texas Constitution "is an elastic term depending upon the necessities of changing times or conditions..." Mumme v. Marrs, 40 S.W.2d 31, 36 (Tex.1931).

VII. THE TRIAL COURT'S ADDITIONAL CONCLUSIONS OF LAW ARE FURTHER SUPPORTED BY SUPREME COURT CASES FROM OTHER STATES, TEXAS SUPREME COURT CASES IN THE AREA OF LEGISLATIVE REAPPORTIONMENTS, AND THE TEXAS LAW REGARDING SPECIAL V. LOCAL LEGISLATION

A. School Finance Cases From Other States Have Decided These Issues In Favor Of Plaintiffs

Other states with constitutional provisions allowing local school district taxes have not found these local tax provisions to insulate the state from its duties under the state's general school clause of the state constitution. Serrano v. Priest, 557 P.2d 929, 955-957 (Cal.1977); Dupree v. Alma School District, 651 S.W.2d 90 (Ark.1983). In Serrano, the State Government argued that the state constitutional provision allowing the legislature to draw school districts

and allowing the state to have those school districts tax, in some way "constitutionalized" the existing school district boundaries with their disparate wealth. The Supreme Court concluded:

> Such a notion we hasten to point out is manifestly absurd. A Constitutional provision creating the duty and power to legislate in a particular area always remains subject to general constitutional requirements covering all legislation unless the intent of the Constitution to exempt it from such requirement plainly appears.

Serrano, 557 P.2d at 956 557 P.2d at 956. Accord, Dupree v. Alma School District, 651 S.W.2d 90 (Ark.1983).

B. The Texas Supreme Court reviews Legislative Action in Cases Like This

B. This case is analogous to Texas Supreme Court cases dealing with the Legislature's authority to draw state legislative districts. Though the Legislature is specifically given that authority by the State Constitution, the Legislature's actions under that authority are still amenable to judicial review. Clements v. Valles, 620 S.W.2d 112 (Tex.1981); Smith v. Craddick, 471 S.W.2d 375 (Tex.1971). The cases upon which state appellants rely are still cases in which the Texas Supreme Court has reviewed actions by the Texas Legislature in drawing school districts. The Texas Supreme Court has found these amenable to review under equal protection or due process standards. Parks v. West, 111 S.W.2d 726 (Tex.1908).

C. The Distinction Between Local and General Law Does Not Support Defendants Theories

The State Appellants have sought to use the change in Article VII, §3 in 1926 from allowing the legislature to create school districts by "general or special law" to allowing the legislature to create districts by "general law" as a mandate for the Legislature to discriminate in the structuring of districts.

The "general law" provisions of the Texas Constitution are extremely broad. Indeed, "the legislature may restrict the application of law to particular counties by the use of classifications, providing classifications are not arbitrary" Smith v. Davis, 426 S.W.2d 827 (Tex.1968). The general standard is that a statute is not a "special law"-even though its enforcement is confined to a restricted area or though it does not apply to all persons-as long as it operates on a subject that people at-large are interested in. Lower Colorado River Authority v. McCraw, 83 S.W.2d 629 (Tex.1935). It is clear that in the area of the structure of school districts the Legislature could design a system of school districts that maximizes the uses of the state's property taxes without violating the "special law" provision of the state constitution. To infer from the "general law" provision of the state constitution that the Legislature can do nothing to change the present school districts structure is pure sophistry. Whatever the general v. special law dichotomy

might mean, it has certainly not discouraged the Texas Legislature from continuing to exert control over "local" as well as "general" policies of education in the state - when it saw fit. See statutues infra at p.6-7.

VIII. Conclusion

For the reasons stated in the previous briefs of the parties in this case and this additional brief the Plaintiffs-Appellees pray that the Trial Court's judgment be affirmed, except for the issues of attorneys fees which have been covered in previous briefs. The State Appellants are seeking to confuse the issues in this case by constantly rephrasing their issues, finding new arguments, and seeking to delay the disposition of this case by any means possible. The Trial Court's judgment is supported in the law and the Constitutional and factual history of the State of Texas; it is demanded by the State's Equal Protection and Education clauses.

DATED: July 15, 1988

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I hereby certify that I have mailed a true and correct copy of the foregoing Appellees' Edgewood Independent School District, et al. Response to State-Appellants' Post Submission Brief by certified mail return receipt requested on this 15th day of July, 1988 to all counsel of record.

Albert H. Kauffman

ALBERT H. KAUFFMAN

RESPONSE TO REPLY

C 8853

No. C-8353

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners

V.

WILLIAM KIRBY, ET AL.,

Respondents

PETITIONERS' REPLY TO BRIEFS IN
RESPONSE TO APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

THE NECESSITY FOR A REPLY

The brief in response by the State of Texas plays fast and loose with the record below and the governing law. This cavalier approach is evidenced by the State's rather obvious violation of the "length" requirements of Rule 136 of the Rules of Appellate Procedure, i.e., not numbering the first eight pages of its brief to avoid the 50-page limit and attaching as an addendum some 150 pages of briefs they filed in the Court of Appeals. The sheer mass of materials filed by defendants justifies this short response.

THE STATE'S FAULTY HISTORICAL ANALYSIS

In its Statement of Facts, the State asserts that the "most significant improvement in Texas occurred in 1949, when the

Legislature adopted a series of laws collectively known as the Gilmer-Aikin Acts . . . ." What the State's brief fails to acknowledge is that the 1949 Joint Legislative Resolution creating the Gilmer-Aikin Committee specifically recognized:

> The foresight and evident intentions of the founders of our State and the framers of our State Constitution to provide equal educational advantages for all . . . ."

(Tex. H.C. Res. 48, 50th Leg. (1948)). The State's brief also fails to advise that 20 years after the Gilmer-Aikin laws, The Connally Commission, chaired by Leon Jaworski, concluded that the Gilmer-Aikin reforms failed in large measure because of the Legislature's failure to reorganize the school districts of Texas, "one of the 'must' proposals of the Gilmer-Aikin Committee." (Pl. Ex. 26).

The Appropriate Legal Analysis

Respondents unjustly accuse us of failing to articulate an appropriate equal protection standard. We think we have done so but for purposes of this reply we will accept, the standard set forth in the brief of the respondents. "Similarly situated individuals must be treated equally unless there is a rational basis for not doing so." (Brief of Respondents Andrews Independent School District, et al., at 25.) Here, the individuals that concern us are the public school children of Texas who are the beneficiaries of the constitutional mandate that the Legislature "make suitable provision for the support and maintenance of an

efficient system of public free schools." These students are treated unequally by the system of funding public education in Texas. What explains this radical difference in the level of funding of public education for students who are presumably entitled to similar treatment from the State of Texas? It is not the willingness of the taxpayers of the school districts to tax themselves, for the evidence demonstrates that low wealth districts tax themselves at higher rates than the wealthy districts. The inequality, as found by the trial court, comes from the "random and often chaotic allocation of wealth among school districts and the resulting discrimination against students in the provision of education," (Conclusion III, 5, Tr. 596).

In response, the State seems to say that the school districts are simply not its responsibility. This argument will not wash. From our earliest days, Article VII §1 has made clear "that the function of such establishment and maintenance was to be performed by State agencies" and any local official performing school functions is in fact "the officer and agent of the State--the State having assumed the functions of maintaining public free schools for the education of the children throughout its domain." Webb County v. Board of School Trustees, 95 Tex. 131 (1901). "Under the Constitution, our public schools are essentially State schools." Mumme v. Marrs, 40 S.W.2d 31, 35 (Tex. 1931). A school district has no authority to levy taxes except insofar as authorized to do so by the Texas Legislature; see, Op. Tex. Att'y Gen. No. JM-835 (1987). In sum, "School districts are but subdivisions of the

state government, organized for convenience in exercising the governmental function of establishing and maintaining public free schools for the benefit of the people. School trustees are public officers, whose powers are under the control of the Legislature." Lee v. Leonard I.S.D., 24 S.W.2d 449 (Tex.Civ.App.--Texarkana 1930, writ ref'd).

The Texas Legislature by virtue of the Texas Constitution "has authority to change, at-will, the territorial boundaries of any school district, and to provide the mode and agencies by which such change shall be effective." Prosper Independent School District v. County Trustees, 58 S.W.2d 5, 6 (Tex. 1933).

The State wants to disclaim responsibility for the funding disparities in the Texas school finance system by suggesting that the responsibility for school districts has been "delegated" (Brief at 34). This shirking is not consistent with Texas law: School districts are creatures of the State; "public schools" are "state schools", school district officers are officers of the State; and the function of education is purely and simply a responsibility of the Texas Legislature. Lee, supra.

CONCLUSION

Whether the analysis is strict scrutiny or rational basis, the answer is the same. There is no constitutional justification for the discrimination in funding that is established by this record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioners' Reply to Briefs in Response to Application for Writ of Error has been sent on this 15th day of March, 1989, by United States Mail, postage prepaid to all counsel of record.

_____
DAVID R. RICHARDS

AMICUS PETITIONER

C 8353

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There is a vast disparity in local property wealth among the Texas school districts. (Tr. 548-50).[1] The Texas school finance system relies heavily on local district taxation. (Tr. 548). These two factors result in enormous differences in the quality of educational programs offered across the State.

There is a direct positive relationship between the amount of property wealth per student in a district and the amount the district spends on education. (Tr. 555). Because their tax bases are so much lower, poorer districts must tax at higher tax rates than the wealthier districts. Even with higher tax rates, however, poorer districts are unable to approach the level of expenditures maintained by wealthier districts. Wealthier districts, taxing at much lower rates, are able to spend significantly more per student. Conversely, poorer districts endure a much higher tax burden, yet are still unable to adequately fund their educational programs.

The interdependence of local property wealth, tax burden, and expenditures, which is so debilitating to the property-poor school districts, is revealed in numerous fact findings of trial court. For example, the wealthiest school district in Texas has more than $14,000,000 of property wealth per student, while the poorest district has approximately $20,000 of property wealth per student, a ratio of 700 to 1. (Tr. 548). The range of local tax rates in 1985-86 was from $.09 (wealthy district) to $1.55 (poor district) per $100.00 valuation, a ratio in excess of 17 to 1. By comparison, the range of expenditures

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Not only are the disparities and inequities found to exist by the trial court shocking, they render the Texas school finance system constitutionally infirm.

ARGUMENT

I. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE STATE CONSTITUTIONAL GUARANTEE OF EQUAL RIGHTS (Op. 3-13).

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The Texas Legislature and Texas courts have also recognized that the Texas Constitution protects against the denial of equal educational opportunity. In authorizing the creation of the Gilmer-Aikin Committee to study public education in Texas, the Legislature recognized "the foresight and evident intentions of the founders of our State and the framers of our State Constitution to provide equal educational advantages for all." Tex. H.C.Res. 48, 50th Leg. (1948). Moreover, Section 16.001 of the Texas Education Code, enacted in 1979, recognizes the policy of the State of Texas to provide a "thorough and efficient" education system "so that each student ... shall have access to programs and services ... that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors." Two courts have concluded that Article VII, Section I's efficiency mandate connotes equality of opportunity. Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931); Watson v. Sabine Royalty, 120 S.W.2d 938 (Tex.Civ.App. -- Texarkana 1938, writ ref'd). Finally, the only other Texas appellate court to directly confront the fundamental right question has concluded, citing Article VII, that education is indeed a fundamental right

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C.

Because the Texas school finance system infringes upon a fundamental right and/or burdens an inherently suspect class, the system is subject to strict or heightened equal protection scrutiny. Stamos, 695 S.W.2d at 560. This standard of review requires that the infringement upon a fundamental right, or the burden upon a suspect class must be "reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means." T.S.E.U. v. Department of Mental Health, 746 S.W.2d 203, 205 (Tex.. 1987). The Texas school finance system surely cannot survive this heightened level of scrutiny. Even the United States Supreme Court recognized as much in Rodriguez. 36 L.Ed.2d at 33.

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Neither does the Texas school finance system satisfy rational basis analysis. In Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985), this Court articulated its own rational basis test to determine the reach of the equal rights provision of the Texas Constitution. Drawing upon the reasoning of Sullivan v. University Interscholastic League, 599 S.W.2d 170 (Tex. 1981), the Court fashioned a "more exacting standard" of rational basis review. Whitworth, 699 S.W.2d at 196. As the Court stated in Sullivan, equal protection analysis requires the court to "reach and determine the question whether the classifications drawn in a

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In contrast to local control, there are two constitutionally and statutorily stated purposed underlying the Texas school finance system. First, Article VII, Section 1, of the Constitution commands the Texas Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Second, Section 16.001 of the Texas Education Code expresses the State policy that "a thorough and efficient system be provided ... so that each student ... shall have access to programs and services ... that are substantially equal to those available to any other similar student, notwithstanding varying local economic factors."

The Texas school finance system is not rationally related to any of the above-discussed alleged or actual purposes. The trial court made a number of fact findings which bear directly upon the rationality of

the system. The findings reveal the vast disparity in property wealth (Tr. 548-49), tax burden (Tr. 553-55), and expenditures (Tr. 551-60); the failure of state allotments to cover the real cost of education (Tr. 565-68); and the denial of equal educational opportunity to many Texas school children (Tr. 601). The irrationality endemic to the Texas system of school finance has also been recognized, and criticized, by every serious study of public education in Texas ever undertaken, including the Statewide School Adequacy Survey, prepared for the State Board of Education in 1935; the Gilmer-Aikin Committee Report of 1948; and the Governor's Committee on Public School Education Report of 1968.

E.

Finally, the Texas system of funding public education is in no way legitimated or authorized by Article VII, Section 3 of the Texas Constitution. That section merely authorizes the Legislature to create school districts and, in turn, to authorize those districts to levy ad valorem taxes. The court of appeals would have us accept the rather strange notion that whenever the Constitution authorizes the Legislature to act, the courts are foreclosed from constitutional equal rights review of the product of the Legislature's actions. The Legislature created school districts in Texas, authorized them to tax, and allocated 50% of the funding of public education in Texas to ad valorem taxes generated from local tax bases. Inasmuch as "school districts are but subdivisions of the state government, organized for convenience in

exercising the governmental function of establishing and maintaining public free schools for the benefit of the people," no amount of sophistry will permit the State to avoid judicial review of its product. Lee, 24 S.W.2d at 450.

II. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION DOES NOT MEET THE MANDATORY DUTY IMPOSED UPON THE LEGISLATURE BY THE TEXAS CONSTITUTION TO MAKE SUITABLE PROVISION FOR THE SUPPORT AND MAINTENANCE OF AN EFICIENT PUBLIC SCHOOL SYSTEM (Op. 13).

The court of appeals erred in refusing to determine whether the current system meets the constitutional duty imposed upon the Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const. Art. VII, §1. "Suitable" and "efficient" are words with meaning; they represent standards which the Legislature must meet in providing a system of public free schools. If the system falls below that standard -- if it is inefficient or not suitable -- then the Legislature has not discharged its constitutional duty and the system should be declared unconstitutional. Courts are competent to make this inquiry. The findings of the trial court, and the conclusions reached in every serious study of Texas education, reveal the gross inefficiency and inequity of the current Texas school finance system.

III. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE DUE COURSE OF LAW PROVISION OF THE TEXAS CONSTITUTION (Op. 15).

State officials have thrust increasingly heavy financial burdens upon local school districts. Wealthy districts have little trouble

meeting these obligations; but for poorer districts, such state-imposed mandates have required substantial increases in property tax rates. The disproportionate burdens imposed upon poorer districts constitute deprivations of property without due course of law, in violation of Article I, Section 19 of the Texas Constitution. In addition, the disparate burdens imposed by the State fly in the face of the constitutional mandate that taxation "shall be equal and uniform." Tex.Const. Art. VIII,§1.

CONCLUSION AND PRAYER FOR RELIEF

The trial court correctly concluded of the Texas system of funding public education: "The wealth disparities among school districts in Texas are extreme, and given the heavy reliance placed upon local property taxes in the funding of Texas public education, these disparities in property wealth among school districts result in extreme and intolerable disparities in the amounts expended for education between wealthy and poor districts with the result that children in the property poor school districts suffer a denial of equal educational opportunity." (Tr. 592). For the reasons stated in this Brief, the undersigned amicus curiae request that this Court reverse the judgement of the court of appeals and affirm the judgement of the trial court. We must no longer tolerate an educational system that perpetuates such inequity.

Respectfully submitted,

✓ Norma Cardenas

Norma Cardenas, President
Board of Trustees
McAllen I.S.D.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief in Support of Petitioners' and Petitioner-Intervenors' Applications for Writ of Error has been sent on this 12th day of May, 1989, by United States Mail, postage prepaid to all counsel of record.

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the system. The findings reveal the vast disparity in property wealth (Tr. 548-49), tax burden (Tr. 553-55), and expenditures (Tr. 551-60); the failure of state allotments to cover the real cost of education (Tr. 565-68); and the denial of equal educational opportunity to many Texas school children (Tr. 601). The irrationality endemic to the Texas system of school finance has also been recognized, and criticized, by every serious study of public education in Texas ever undertaken, including the Statewide School Adequacy Survey, prepared for the State Board of Education in 1935; the Gilmer-Aikin Committee Report of 1948; and the Governor's Committee on Public School Education Report of 1968.

E.

Finally, the Texas system of funding public education is in no way legitimated or authorized by Article VII, Section 3 of the Texas Constitution. That section merely authorizes the Legislature to create school districts and, in turn, to authorize those districts to levy ad valorem taxes. The court of appeals would have us accept the rather strange notion that whenever the Constitution authorizes the Legislature to act, the courts are foreclosed from constitutional equal rights review of the product of the Legislature's actions. The Legislature created school districts in Texas, authorized them to tax, and allocated 50% of the funding of public education in Texas to ad valorem taxes generated from local tax bases. Inasmuch as "school districts are but subdivisions of the state government, organized for convenience in

exercising the governmental function of establishing and maintaining public free schools for the benefit of the people," no amount of sophistry will permit the State to avoid judicial review of its product. Lee, 24 S.W.2d at 450.

II. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION DOES NOT MEET THE MANDATORY DUTY IMPOSED UPON THE LEGISLATURE BY THE TEXAS CONSTITUTION TO MAKE SUITABLE PROVISION FOR THE SUPPORT AND MAINTENANCE OF AN EFICIENT PUBLIC SCHOOL SYSTEM (Op. 13).

The court of appeals erred in refusing to determine whether the current system meets the constitutional duty imposed upon the Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const. Art. VII, §1. "Suitable" and "efficient" are words with meaning; they represent standards which the Legislature must meet in providing a system of public free schools. If the system falls below that standard -- if it is inefficient or not suitable -- then the Legislature has not discharged its constitutional duty and the system should be declared unconstitutional. Courts are competent to make this inquiry. The findings of the trial court, and the conclusions reached in every serious study of Texas education, reveal the gross inefficiency and inequity of the current Texas school finance system.

III. THE TEXAS SYSTEM OF FUNDING PUBLIC EDUCATION VIOLATES THE DUE COURSE OF LAW PROVISION OF THE TEXAS CONSTITUTION (Op. 15).

State officials have thrust increasingly heavy financial burdens upon local school districts. Wealthy districts have little trouble

meeting these obligations; but for poorer districts, such state-imposed mandates have required substantial increases in property tax rates. The disproportionate burdens imposed upon poorer districts constitute deprivations of property without due course of law, in violation of Article I, Section 19 of the Texas Constitution. In addition, the disparate burdens imposed by the State fly in the face of the constitutional mandate that taxation "shall be equal and uniform." Tex.Const. Art. VIII,§1.

CONCLUSION AND PRAYER FOR RELIEF

The trial court correctly concluded of the Texas system of funding public education: "The wealth disparities among school districts in Texas are extreme, and given the heavy reliance placed upon local property taxes in the funding of Texas public education, these disparities in property wealth among school districts result in extreme and intolerable disparities in the amounts expended for education between wealthy and poor districts with the result that children in the property poor school districts suffer a denial of equal educational opportunity." (Tr. 592). For the reasons stated in this Brief, the undersigned amicus curiae request that this Court reverse the judgemen of the court of appeals and affirm the judgement of the trial court. We must no longer tolerate an educational system that perpetuates such inequity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief in Support of Petitioners' and Petitioner-Intervenors' Applications for Writ of Error has been sent on this 12th day of May, 1989, by United States Mail, postage prepaid to all counsel of record.

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